Filed 7/25/19 Hi-Land Mountain Homes, Inc. v. McEntyre CA4/2
See concurring and dissenting opinion.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

HI-LAND MOUNTAIN HOMES, INC. et al., Plaintiffs and Respondents, v. WENDY MCENTYRE, Defendant and Appellant.	E069194 (Super.Ct.No. CIVDS1703313) OPINION

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez, Judge. Affirmed with directions.

Law Offices of M. David Meagher and M. David Meagher for Defendant and Appellant.

Abouelsood & Associates and Ramy A. Abouelsood for Plaintiffs and Respondents.

Defendant and appellant Wendy McEntyre appeals the denial of her motion, pursuant to Code of Civil Procedure section 425.16,[1] to strike the complaint of plaintiffs and respondents Hi-Land Mountain Homes, Inc., a California corporation (Hiland) dba Above It All Treatment, LLC. (AIA)[2]; Kory Avarell, as an individual, and Kyle Avarell, as an individual (collectively, Respondents) as a "SLAPP" suit (strategic lawsuit against public participation).

Respondents, operators of drug rehabilitation centers in Lake Arrowhead, filed their complaint against McEntyre alleging five causes of action for defamation, libel per se, trade libel, interference with actual and prospective economic business advantage, false light and a sixth cause of action for stalking. Respondents alleged that McEntyre posted negative comments on Facebook and commented in newspaper articles in order to ruin their reputation and business. The trial court denied McEntyre's SLAPP motion finding that, although McEntyre's statements alleged to support the first five causes of action were made in a public forum and were of public interest, Respondents had shown a probability of prevailing on the claims. Further, the sixth cause of action, stalking, involved conduct, not speech.

On appeal, McEntyre makes two claims: (1) the trial court erred by refusing to strike Respondent's complaint as to the first five causes of action pursuant to section

---

[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[2] AIA was no longer a limited liability company as of the time of filing of the appeal.

425.16; and (2) the trial court erred by failing to hold the sixth cause of action was subject to the motion to strike pursuant to section 425.16, subdivisions (e)(1) and (e)(2).

FACTUAL AND PROCEDURAL HISTORY

A. COMPLAINT

On February 24, 2017, Respondents filed a complaint for damages against McEntyre (Complaint). They alleged six causes of action for defamation, libel per se, trade libel, interference with actual and prospective economic business advantage, false light and stalking.

Respondents provided that HiLand operated drug and alcohol rehabilitation centers in Lake Arrowhead called AIA. Kory[3] was the owner and Kyle was the chief executive officer. They alleged that McEntyre ran a non-profit legal organization and website called JarrodsLaw.Org Inc. (JarrodsLaw). According to its website, the mission of JarrodsLaw was to " 'promote public awareness and interest in sober living homes.' "

Respondents alleged that on September 15, 2015, McEntyre posted on her personal Facebook page, " 'Jarrod's Law, aka Wendy McEntyre, had been very busy this year . . . Much of her time has been dedicated to closing down a rogue rehab organization that has taken a foothold in the Lake Arrowhead area with more than 20 unsafe sober living homes and drug treatment centers.' " Respondents alleged that since 2014, McEntyre had personally made false claims against Respondents with the purpose of shutting down their sober living homes.

[3] Because Kory and Kyle have the same last name, we refer to them by their first names. No disrespect is intended

On December 14, 2015, she posted the following on her Facebook page in reference to the Respondents: " 'MOTHER FUCKERS . . . [¶] THIS PERSON IS [¶] DEAD . . . [¶] ABOVE IT ALL IS MURDERING PEOPLE, IN MY [¶] OPINION . . . .' " In addition, she posted, " 'This is the 6th death in 25 months.' "

On December 15, 2015, McEntyre posted, " '6 deaths since May 2014. I have been told there are 20 others.' " McEntyre left a voicemail message on Kyle's phone identifying herself and claiming to be aware of his personal taxes and HiLand's taxes, which she insisted were " 'bull shit.' " She also stated that what they were doing was illegal and she would see them in court. On May 9, 2016, Respondents were able to obtain a restraining order against McEntyre to stay away from Kyle, Kory and all AIA treatment centers.

Despite the restraining order, on two occasions, Kyle observed McEntyre outside his gym; she watched him enter and exit. On May 21, 2016, two weeks after the restraining order was issued, McEntyre posted on her Facebook page, " 'The last death at Above It All was a young man from Massachusetts. It broke my heart seeing him dropped off. 3 days later he died in detox which should NOT have happened. They advertise as 24hr. acute care. THEY ARE LYING . . . Do not send your loved one to Above It All in Lake Arrowhead. They are not safe there.' "

In addition, on July 9, 2016, she provided a link to an article on her Facebook page about Respondents, which had been published in a Lake Arrowhead newspaper. With the link, she wrote the following: " 'Kyle and Kory Avarell are liars and thiefs (sic). Kory Avarell sexually assaults his clients AND staff. I have been investigating 6 deaths at

their illegal places in the last 24 months. DO NOT SEND YOUR LOVED ONE TO ABOVE IT ALL. They really do believe they are ABOVE IT LAW! If you have been harmed at this place, please private message me.' "

On July 13, 2016, McEntyre posted on Facebook, " 'It's time to rise up and shut down these horrible houses of horrors masquerading as legit treatment centers . . . ABOVE IT ALL TREATMENT in Lake Arrowhead California ARE DANGEROUS. Your loved one IS NOT SAFE THERE!!' " On November 19, 2016, she posted on JarrodsLaw Facebook page, " 'The only thing Above It All has down to a science is hurting people and ripping off insurance companies and vulnerable family members and destroying lives when our loved ones die in their care.' "

McEntyre was quoted in an article in the Alpenhorn News published on January 1, 2016, about Respondents as follows: " 'there have been six confirmed deaths from AIA patients/clients since May 2014' " and " 'They (AIA) do not have trained staff with proper certifications or licensing to oversee and manage these clients.' " The article remained on the Alpenhorn News website.

Respondents also alleged that McEntyre set up a false Yelp! account under the name " 'Brian H.' " The account was opened in July 2016 by a Lake Arrowhead resident. In one post, " 'Brian H.' " gave a " 'five-star review' " to another rehabilitation facility in what Respondent alleged was an attempt to avert business from AIA. In July 2016, " 'Brian H.' " made another review for AIA, stating, " 'Beware. Lockdown situation. Has been illegally operating a detox without a license for years. Under investigation by FBI for illegal activities.' " Further, " 'Brian H.' " submitted a review

on July 15, 2016, making the statement " 'Oh . . . I haven't forgotten about you Above It All.' "

On December 13, 2016, McEntyre appeared at a California Labor Board Commission hearing where a former employee of AIA had filed an unemployment claim against HiLand dba AIA. Kory was present at the hearing. McEntyre placed a copy of the Alpenhorn News article about AIA on the table for everyone at the hearing to observe.

The first cause of action, defamation, alleged by all Respondents, was based on the Facebook posts from December 15, 2015, and July 9, 2016, which had a link to the January 1, 2016, article in the Alpenhorn News. The second cause of action, trade libel, alleged by Respondents, relied upon the Facebook posts on September 21, 2015, the Facebook post on December 14, 2015, the Yelp! posts from July 13, 2016, the July 9, 2016, Facebook post, and the January 1, 2016, Alpenhorn News article. The third cause of action, libel per se, alleged only by Kory and Kyle, relied on the July 9, 2016, Facebook post and the January 1, 2016, Alpenhorn News article. They alleged that they were not responsible for six or 20 deaths since May 2014; they were not liars and thieves; and they had trained staff.

The fourth cause of action, alleged by Respondents, involved interference with actual and prospective economic advantage. It alleged that all of the statements and acts done by McEntyre were willful and malicious with the intent to ruin Respondents' business. The fifth cause of action, alleged by Respondents, was false light based on the statements in the January 1, 2016, article and the July 9, 2016, Facebook post.

The sixth cause of action, alleged by Kory and Kyle, was for stalking. All of the acts committed by McEntyre showed she engaged in a pattern of conduct the intent of which was to alarm and harass Kyle and Kory within the meaning of Civil Code section 1708.7, subdivisions (a) and (b). A restraining order had been issued on May 9, 2016, based on McEntyre's behavior, and she violated the order. Respondents were harmed by loss to their reputation, shame, mortification and injury due to McEntyre's numerous false statements.

McEntyre filed an answer to the Complaint denying all of the allegations.

B. THE SLAPP MOTION

On May 4, 2017, McEntyre filed her notice of motion and motion to strike plaintiff's unverified complaint as a SLAPP (SLAPP Motion). She insisted she faced an "unparalleled assault" on her "Constitutionally protected Right of Participation and Free Speech rights . . . arising out of participation in judicial proceedings, and free speech, on a public issue, in a public forum." McEntyre filed a request for judicial notice of the following: (1) Appointment letter by the State of California, Department of Health Services, Drug and Alcohol Division, Director's Advisory Council; (2) the register of actions for the San Bernardino Superior Court for cases involving Respondents; (3) newspapers published and circulated in San Bernardino County; (4) a public records request by McEntyre; and (5) Public Records Request Act by the State of California.

She submitted a memorandum of points and authorities. McEntyre alleged that her comments served the public interest because it was "discussion as to whether or not consumers and potential referral resources should be warned of the problems arising from

the quality of care offered in their licensed, and unlicensed houses." She argued that newspapers and the Internet were a public forum. All six causes of action included both protected and unprotected activity. As such, relying upon the California Supreme Court case of *Baral v. Schnitt* (2016) 1 Cal.5th 376 (*Baral*), McEntyre argued all of the causes of action must be struck.

McEntyre argued her statements were not false because AIA already had a tarnished reputation. The legal problems were well-documented and published. All of the causes of action failed because Respondents had not shown her statements were false. Finally, the claim of stalking was without merit. She attended a Labor Commission Board meeting, which was open to the public so was not a violation of the restraining order. McEntyre argued that she had met her burden of showing that the Complaint was based on protected speech. Moreover, Respondents were unable to meet their burden of showing they would prevail on their causes of action.

McEntyre presented the declaration of Jean Nightingale. She was employed by AIA from 2013 to 2015. Nightingale was aware that McEntyre was an outspoken advocate in regard to "rogue" sober living and treatment centers. In December 2015, Nightingale filed a wage claim for unpaid overtime with the California Labor Commission against AIA. McEntyre helped her with the claim.

McEntyre also submitted her own declaration. She stated she was an appointed member of the California Department of Health Services, Drug and Alcohol Division, Director's Advisory Council. She admitted she was a vocal opponent of Respondents. She obtained knowledge of AIA by speaking with families who have had family

members in the facilities, and AIA employees. She personally reviewed the San Bernardino County Superior Court register of actions showing that three wrongful death lawsuits had been filed against AIA. She also attached numerous newspaper articles regarding AIA's activities printed in the Alperhorn News and Mountain News. She insisted she never posted on Yelp! as Brian H. She admitted she had republished the Brian H. review but did not write it.

Exhibit 1 was the letter from the Department of Alcohol and Drug Programs in the State of California Health and Human Resources Program confirming McEntyre was appointed to the director's advisory council. It consisted of members of associations from the larger drug and alcohol field.[4]

C. OPPOSITION TO THE SLAPP MOTION

On or about June 5, 2017, Respondents filed opposition to the SLAPP Motion. They asserted the issues alleged in the Complaint did not involve McEntyre's free speech and did not involve matters of public interest. Further, sufficient evidence existed to demonstrate there was a probability that they would prevail on their claims.

Respondents again set forth all of the comments made by McEntyre since September 2015 and continuing to November 2016. Respondents first contended that newspapers, newsletters and other media outlets are not all public forums. Websites accessible to the public are public forums for SLAPP purposes but not all involve a

[4] McEntyre attached numerous other exhibits (Ex. 2-19) but judicial notice of these exhibits was denied. She does not argue on appeal that the trial court improperly denied judicial notice and most of the exhibits included in the clerk's transcript are illegible. As such, these exhibits are not relevant to the issues on appeal.

public issue. The posts by McEntyre were not of concern to anyone other than her and a small number of people who commented on them. Further, the JarrodsLaw Facebook page was not shown to be sufficiently open to the general public to be considered a public forum.

Respondents alleged that the statements accusing them of crimes—murder, sexual assault, theft—were libel per se. Respondents admitted they had been involved in 13 lawsuits since 2004, which included three wrongful death cases. However, Kory and Kyle had never been investigated for murder, sexual assault, or criminal theft. AIA had not been sued or held responsible for six deaths since May 2014 or 20 other deaths. None of the lawsuits or articles about Hiland and/or AIA, included as exhibits by McEntyre, referred to acts of murder, sexual misconduct, lying, being thieves or overmedicating their clients and killing them all in detox. The SLAPP Motion should be denied as she failed to show her speech was a matter of public interest.

Moreover, Respondents had shown a probability of prevailing on the merits. The statements by McEntyre were false. There was no evidence to support her allegations of criminal misconduct. Finally, as to stalking, McEntyre continued to harass and have negative conduct with Kory and Kyle despite the restraining order, including attempting to speak with them at an AIA facility.

Respondents provided the declaration of Emily Sara Parker in support of the opposition. She was a human resource specialist employed by HiLand dba AIA. She was hired in January 2015. She monitored all websites and social media sites for any statements made about AIA. She monitored McEntyre's and JarrodsLaw Facebook sites.

She had downloaded the Facebook page belonging to McEntyre on June 3, 2017. In her profile, McEntyre aligned herself with JarrodsLaw and provided a link to the page. Jarrod was McEntyre's deceased son. Parker provided the downloaded posts from the Facebook sites belonging to McEntyre and JarrodsLaw as exhibits to her declaration. This included the July 9, 2016, post.

Parker also stated that on May 12, 2017, McEntyre drove her car onto an AIA property. McEntyre asked another person if the property belonged to AIA and said that she wanted to speak with the owner. Parker started toward the car and McEntyre, who apparently recognized her, immediately drove off. Parker filed a police report, which she also included as an exhibit to her declaration.

Kyle also submitted a declaration in support of the opposition to the SLAPP Motion. HiLand dba AIA was a C corporation; AIA was a limited liability company. On at least two occasions in 2016, he had seen McEntyre outside his gym. He received a restraining order for himself, Kory and AIA on May 9, 2016, against McEntyre. It included that McEntyre was to have "no negative contact or communication" with Kyle, Kory and AIA employees and facilities. He had never been personally sued for sexual harassment or sexual assault by any employee of AIA. He had never been charged with theft. He had never been convicted or accused of theft or murder. AIA had not been accused of murder. It had been sued for wrongful death three times.

Based on Kyle's information and belief, there had not been six deaths, much less 20 deaths, on AIA properties. One client died of respiratory problems on an AIA property. AIA did not have a policy of over medicating persons in detox and not all

clients had died during detox. Kyle, based on his information and belief, attested that all employees of AIA had proper certifications and licenses. AIA had been negatively impacted by McEntyre's posts. He attested that potential clients had chosen treatment at other facilities over AIA based on McEntyre's comments. Further, his own reputation had been negatively impacted by her posts.

Kory also submitted a declaration in support of the opposition to the SLAPP Motion. Kory also declared that he had never been accused of murder or theft by anyone other than McEntyre; he had not been sued for sexual harassment or sexual assault; and never had charges of murder or theft brought against him.

On December 13, 2016, Kory appeared before the California Labor Board Commission as a representative of HiLand dba AIA in a wage and hour matter involving Nightingale. McEntyre entered the room and Kory immediately contacted the police to report that she had violated the restraining order. The hearing proceeded with McEntyre questioning Kory. During the hearing, McEntyre had an article about AIA on the table in front of her. The headline was " 'Above It All troubles.' " AIA had been negatively impacted by the statements made by McEntyre on social media. Clients had chosen other facilities for their rehabilitation due to McEntyre's comments. His own reputation had been tarnished due to comments made by McEntyre.

D. REPLY TO THE OPPOSITION TO THE SLAPP MOTION

McEntyre filed her reply to the opposition to the SLAPP Motion. McEntyre insisted that as a member of the California State Advisory Board it was her job to alert prospective consumers of issues concerning choosing an addiction treatment center.

McEntyre provided several cases in which the courts found consumer information posted on a website concerned an issue of public interest and that the Internet was a public forum. Comments were made to her Facebook posts that confirmed her postings were in the public interest. McEntyre insisted the Complaint was based on her comments as a consumer advocate. She further argued the causes of action for trade libel and interference with actual and prospective business advantage must be stricken because Respondents failed to adduce any admissible evidence of actual pecuniary loss attributable to McEntyre.

McEntyre also argued for the first time that the causes of action were barred by the statute of limitations. The Complaint was filed on February 24, 2017. Accordingly, any statements made from 2015 up to February 24, 2016, were barred by the statute of limitations. The time-barred allegations were all part of the five causes of action, and pursuant to *Baral* all of the causes of action must be struck. McEntyre objected to portions of the declarations of Kory, Parker, and Kyle submitted in support of the opposition to the SLAPP Motion.[5] Respondents opposed the objections.

C. TRIAL COURT RULING

On July 28, 2017, the trial court issued its ruling. It first addressed McEntyre's request for judicial notice. It only allowed Exhibit 1.

[5] On appeal, McEntyre does not contest the ruling on her objections. As such, it is not necessary to provide the objections in detail.

As for whether McEntyre showed that the Complaint arose from protected activity, it found that she had met her burden for causes of action one through five, but not six. It found the first five causes of action were based on speech by McEntyre. However, the sixth cause of action was predicated on her "harassing conduct" by watching Kyle and appearing at a legal matter involving Kory. The court concluded, "Conduct is not a matter subject to the Anti-Slapp statute."

The trial court then addressed whether McEntyre's statements were made in a public forum. The statements made by McEntyre were done through a local newspaper and publicly available Facebook pages. The "mediums used to communicate by McEntyre may be deemed public forums." The trial court felt that the issue was a close call as to public interest, but the newspaper article was providing information on a public issue, and McEntyre's posts addressed a topic of public interest in drug and alcohol treatment centers. The trial court found that the statements made by McEntyre were protected speech under section 425.16.

The burden shifted to Respondents to show a probability of prevailing. Both Kyle and Kory attested to never being sued, nor accused of sexual harassment or theft, and never being accused or convicted of murder. HiLand and/or AIA had been sued for wrongful death in three cases, but had not been held liable and certainly had not been accused of six or twenty murders. Kyle and Kory also attested to having proper licensing, and that they did not overmedicate their clients.

The trial court concluded, "These averments challenge the veracity of the various posting[s] and comments of McEntyre. They raise the possibility of [Respondents] being able to show McEntyre's statements and posting[s] are false. The declarations further support harm is occurring from the alleged defamatory comments. Enough is stated to indicated a probability of prevailing on the 1st-5th causes of action."

The trial court then addressed whether some of the statements made by McEntyre were time-barred. It found that the defamatory statements made on September 21, 2015; December 14, 2015; December 15, 2015; January 1, 2016; and January 28, 2016, were time-barred. However, statements made by McEntyre on May 21, 2016, July 9, 2016, July 13, 2016, July 15, 2016, and November 19, 2016, could support the claims. The statute of limitations defense was not a defense to the entire claim. Moreover, all of the statements could be considered with the sixth cause of action to show a pattern of conduct.

The trial court concluded with the following ruling: "(1) DENY Defendant McEntyre's Anti-Slapp Motion to the 6th cause of action because the gravamen of that claim is about McEntyre's conduct versus her speech and petitioning activity thereby it is not covered by . . . §425.16; [¶] (2) DENY Defendant McEntyre's Anti-Slapp Motion in relation to striking the entire 1st-5th causes of action because Plaintiffs have established a likelihood of prevailing on their defamation-based claims, but GRANT Defendant McEntyre's Anti-Slapp Motion in relation to striking [¶][¶] 43, 45, 54, 56, 58 and p. 13:21-22 and 13:24-26 (bullet points 4, 6 and 7 to [¶] 64) because said allegations refer to time-barred defamatory comments, which cannot be utilized to support the 1st-5th

causes of action; [¶] (3) GRANT Defendant McEntyre's request for judicial notice of her Acceptance Letter (Exh. 1), but DENY judicial notice of all other requested matters; and [¶] (4) OVERRULE Defendant McEntyre's evidentiary objections."

DISCUSSION

McEntyre first claims on appeal that the trial court erred by denying the SLAPP Motion as to causes of action one through five based on the speech being protected; Respondents failed to prove a probability of prevailing; and the litigation privilege of Civil Code section 47(b) bars relief.[6]

A. BURDEN OF PROOF AND STANDARD OF REVIEW

Section 425.16 applies to any cause of action arising from an " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue.' " (§ 425.16, subd. (e).) This speech includes, "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place

[6] We note that in McEntyre's brief, she makes arguments with citations to authority throughout the introduction and the procedural history. We also note that McEntyre does not provide a sufficient statement of facts, rather, providing argument in place of a succinct factual background. We will only consider those claims raised in the argument section. Moreover, Respondents have failed to cite to the record in their statement of the case and facts of the case. Neither of the parties briefs assist this court in determining those statements that were considered by the trial court and those that were time barred.

open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (*Ibid*.) In ruling on a motion under section 425.16, the trial court engages in what is now a familiar two-step process: "First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral*, *supra*, 1 Cal.5th at p. 384; see also *ComputerXpress v. Jackson* (2001) 93 Cal.App.4th 993, 998-999 (*ComputerXpress*).) In order to encourage participation in matters of public significance, section 425.16 "shall be construed broadly." (§ 425.16, subd. (a).)

"Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) In making these determinations, "the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).)

"We review an order granting or denying a motion to strike under section 425.16 de novo." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.)

B. CAUSES OF ACTION ONE THROUGH FIVE

Before we can evaluate each of the causes of action as to whether they were in the public interest/forum and whether Respondents had a probability of prevailing on the

claims, it is necessary to determine what statements were properly admissible, i.e. the statements that were not barred by the statute of limitations. The trial court struck all allegations that occurred prior to February 24, 2016. This included the Alpenhorn News article (first published on January 1, 2016), which contained the statements that there were 20 deaths at AIA and that they were unlicensed, and several Facebook posts. The following remained to support each claim based on the allegations in the Complaint: (1) Defamation—July 9, 2016, Facebook post that stated, " 'Kyle and Kory Avarell are liars and thiefs (*sic*). Kory Avarell sexually assaults his clients AND staff. I have investigating 6 deaths at their illegal places in the last 24 months. DO NOT SEND YOUR LOVED ONE TO ABOVE IT ALL. They really do believe they are ABOVE THE LAW. If you have been harmed at this place please private message me.' "; (2) Trade libel—July 9, 2016, Facebook post and the Yelp! review on July 13, 2016, which stated, " 'It's time to rise up and shut down these horrible houses of horrors masquerading as legit treatment centers. ABOVE IT ALL TREATMENT in Lake Arrowhead California ARE DANGEROUS. Your loved one IS NOT SAFE THERE!!' "; (3) Libel per se was based on the July 9, 2016, Facebook post; (4) Interference with actual and prospective economic advantage—realleged and incorporated every allegation contained in the preceding paragraphs; and (5) False light—based on the July 9, 2016, Facebook post.

McEntyre claims that pursuant to *Baral*, once the trial court concluded that some of the statements were barred by the statute of limitations, it was required to dismiss the entire cause of action. Here, as noted, the trial court struck some of the statements made

by McEntyre finding that they were time-barred. Under *Baral*, "[I]n cases involving allegations of both protected and unprotected activity, the plaintiff is required to establish a probability of prevailing on any claim for relief based on allegations of protected activity. Unless the plaintiff can do so, the claim and its corresponding allegations must be stricken." (*Baral*, *supra*, 1 Cal.5th at p. 396.) However, the court need not strike the entire cause of action if it is supported by unprotected activity. (*Id.* at p. 382, 393)

The language of *Baral* does not address activity barred by the statute of limitations. Additionally, even if it did, *Baral* allows the trial court to strike allegations that are protected activity but keep the causes of action if supported by unprotected activity, or the plaintiff proves the probability of prevailing on the protected activity. (*Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28, 42-43, 49.) Moreover, the trial court here found, as to causes of action one through five, that all the statements were protected activity. *Baral* has no application to causes of action one through five.

1. *PUBLIC FORUM AND PUBLIC INTEREST*

Here, the trial court found that McEntyre's statements in newspapers, Facebook and Yelp! all came within section 425.16, subdivision (e)(3) in that they were "written or oral statement[s] or writing[s] made in a place open to the public or a public forum in connection with an issue of public interest." McEntyre insists that her comments were made in the public forum and in the public interest. We need only consider whether the Facebook posts and Yelp! reviews were protected activity as the newspaper articles were published prior to February 24, 2016.

Several cases have held that Facebook posts and reviews on public websites are made in public forums. (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1252 [Facebook posts were made in public forum]; *ComputerXpress*, *supra*, 93 Cal.App.4th at pp. 1006-1009 [websites are public forum].) We agree with the trial court that the Facebook posts were made in a public forum.

As noted by the trial court, it was a close call as to whether the comments made on Facebook were an issue of public interest. "[S]imply because a general topic is an issue of public interest, not every statement somewhat related to that subject is also a matter of public interest within the meaning of section 425.16, subdivision (e)(3) or (e)(4)." (*Jackson v. Mayweather*, *supra*, 10 Cal.App.5th at p. 1263.) Here, the July 9, 2016, Facebook post was an attack on Respondents in relation to their drug rehabilitation facilities. Certainly, drug rehabilitation is a matter of public interest, but it is not necessarily clear that McEntyre's attacks on the owners of one drug and rehabilitation center is in the public interest. In *Dual Diagnosis Treatment Center, Inc. v. Buschel* (2016) 6 Cal.App.5th 1098, the Court of Appeal examined statements made that a San Clemente drug and alcohol facility was unlicensed and that it was being investigated. The court held, "[t]here is no showing that the San Clemente rehabilitation facility impacts, or has the potential to impact, a broad segment of society, or that the statements were part of some larger goal to provide consumer protection information." (*Id.* at p. 1105.) However, in *Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, 523-524, the court found that the financial viability of the owner and

operator of four Orange County hospitals was of widespread public interest because it was large and powerful enough to impact the healthcare needs of county residents.

Here, AIA operated in the small community of Lake Arrowhead and had the potential to impact the community. We will conclude that the statements were a matter of public interest and proceed to address whether Respondents showed a probability of prevailing on their claims.

2. *PROBABILITY OF PREVAILING*

"We have described this second step as a 'summary-judgment-like procedure.' [Citation.] The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment." (*Baral, supra,* 1 Cal.5th at pp. 384-385, fn. omitted; see also *Area 51 Productions, Inc. v. City of Alameda* (2018) 20 Cal.App.5th 581, 593.) We "accept[] the plaintiff's evidence as true, and evaluate[] the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law." (*Baral,* at p. 385.)

The burden of establishing probability of prevailing is not high. Plaintiff's must only show minimal merit. (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699-700.) "However, the plaintiff 'cannot simply rely on the allegations in the complaint' [citation], but 'must provide the court with sufficient evidence to permit the court to determine whether "there is a probability that the plaintiff will prevail on the claim." ' " (*ComputerXpress, supra,* 93 Cal.App.4th at p. 1010.)

First Cause of Action—Defamation alleged by all Respondents. "Defamation is 'a false and unprivileged publication that exposes the plaintiff "to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." ' " (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1047-1048; see also *Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1242 ["Defamation constitutes an injury to reputation"].) To state a defamation claim, a plaintiff must present evidence of a statement of fact, rather than opinion, that is "provably false." (*Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 809.) In order to determine if a statement is false, the court considers the " 'totality of the circumstances.' " (*Ibid.*) " ' "First, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense. . . . [¶] Next, the context in which the statement was made must be considered. . . . [¶] This contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed." ' " (*Id.* at pp. 809-810.)

The critical question is not whether a statement is fact or opinion, but " 'whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact.' " (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1370.)

Here, the only remaining statements supporting the defamation claim as pleaded in the Complaint was the July 9, 2016, Facebook post. The declarations of Kyle and Kory, which the trial court found were admissible evidence, established that there were only three wrongful death cases brought against HiLand and/or AIA. There had not been six

"murders" at AIA facilities. The accusations of murder against Respondents were false based on the evidence and was not contradicted by McEntyre; in fact, she admitted she was only aware of three unlawful death suits filed against Respondents.

Further, there had been no theft charges brought against Kory and Kyle. McEntyre also claimed that Kory had sexually assaulted a client and staff at AIA. This was contested by Kory who attested that he had never been charged with sexual assault. There was no evidence to the contrary. These statements were not the type where McEntyre expressed it was her "opinion." She stated that she was investigating six deaths and Kory had committed sexual assault. "They [were] not phrased as mere impressions." (*Hawran v. Hixson* (2012) 209 Cal.App.4th at p. 291.) Respondents established these comments supported a defamation cause of action.

Second Cause of Action—trade libel alleged by Respondents. The cause of action for trade libel is also supported by the July 9, 2016, email and by the comments made on Yelp!. "Trade libel is generally distinguished from common-law defamation and is said to connote ' "an intentional disparagement of the quality of property, which results in pecuniary damage to plaintiff." ' " (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 381.) Libel is "a false and unprivileged publication by writing, . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Civ. Code, § 45.) "A defamatory publication not libelous on its face is not actionable unless the plaintiff alleges that he has suffered special damages as a result thereof." (*Selleck v. Globe International, Inc.* (1985) 166 Cal.App.3d 1123, 1130.)

Here, the July 9, 2016, Facebook post stated that McEntyre was investigating six deaths that occurred at AIA. She also stated that Kory sexually assaulted his clients and employees. The Yelp! reviews stated it was not safe at AIA centers and that they were being investigated by the FBI. In context, McEntyre admitted she was an outspoken advocate against AIA. Nightingale also stated that she knew McEntyre was an advocate against sober living and treatment centers. This evidence supported that McEntyre's statements subjected Respondents to ridicule and contempt, and had tendency to injure their business, to support the trade libel cause of action.

McEntyre insists that Respondents failed to show a probability of prevailing on this second cause of action because they did not show damages. Both Kory and Kyle attested to the fact that they were losing clients, who chose to go to other rehabilitation facilities based on McEntyre's statements on Facebook and Yelp!. Respondents need only "demonstrate a prima facie showing of facts to sustain a favorable judgment if [their] evidence is credited." (*Hawran v. Hixson, supra,* 209 Cal.App.4th at p. 293.) Their declarations were sufficient to show that they could prove they had suffered damages.

Third Cause of Action—libel per se alleged by Kory and Kyle. "Libel per se, . . . , is based in common law defamation, and thus relates to the standing and reputation of the businessman as distinct from the quality of his or her goods. [Citation.] A corporation can be libeled by statements which injure its business reputation." (*Barnes-Hind, Inc. v. Superior Court, supra,* 181 Cal.App.3d at p. 381.) " 'A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or

other extrinsic fact, is said to be a libel on its face.' " Libel per se does not require that damages be proven. (*Id.* at p. 382.) "Perhaps the clearest example of libel per se is an accusation of crime." (*Id.* at p. 385.)

Here, McEntyre accused Kory of sexual assault. She accused both Kory and Kyle of murder. Their declarations supported that they had never been charged with either crime. Although McEntyre stated she was aware that AIA had been sued three times for wrongful death, she provided no admissible evidence that Kory was charged or even accused of sexual assault or murder. Kory and Kyle established that McEntyre's accusations of crimes without any proof or accusation of these crimes supported the libel per se claim.

Cause of Action Four—interference with actual and prospective economic advantage alleged by Respondents. " 'The elements of a claim of interference with economic advantage and prospective economic advantage are: " ' "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional [or negligent] acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." ' " ' " (*Crown Imports, LLC v. Superior Court* (2014) 223 Cal.App.4th 1395, 1404.) " '[A] plaintiff must plead and prove that the conduct alleged to constitute the interference was independently wrongful, i.e., unlawful for reasons other than that it interfered with a prospective economic advantage.' " (*Id.* at p. 1404.) "It is the plaintiff's burden to plead and prove that the

defendant's conduct is independently wrongful in order to recover. The fact that the defendant's conduct was independently wrongful is an element of the cause of action itself." (*Id.* at pp. 1404-1405.) Here, Respondents generally pled the cause of action, not stating the specific unlawful conduct or acts, rather incorporating the entire Complaint. Since the trial court struck some of the acts as time-barred it is not clear what unlawful act or conduct supports this cause of action. This cause of action should have been stricken by the trial court.

Cause of Action Five—false light alleged by Respondents. " 'False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed.' " (*Jackson v. Mayweather, supra,* 10 Cal.App.5th at p. 1264.) When " 'a false light claim is coupled with a defamation claim, the false light claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action.' " (*Ibid*.) We have already stated that Respondents have shown a probability of prevailing on the defamation claim and it equally applies to the false light cause of action.

While it appears the trial court considered all of the defamatory statements in reaching its decision on the SLAPP suit, we review de novo whether the admissible defamatory statements warrant dismissal of the Complaint as a SLAPP suit. While other Facebook posts were made after February 24, 2016—on July 13, 2016, and November 19, 2016—Respondents did not allege these statements supported their causes of action

in the Complaint. Moreover, these posts appeared to be McEntyre's opinions rather that interpreted as statements of fact. (*Seelig v. Infinity Broadcasting Corp., supra,* 97 Cal.App.4th at p. 809.) However, based on the foregoing admissible statements and evidence presented by Respondents, they have shown a probability of prevailing on causes of action one, two, three and five to survive the SLAPP Motion.

We note McEntyre states that her speech was protected pursuant to Civil Code sections 47(b) and (c) and she was entitled to immunity under 47 U.S.C. 230. However, she provides no argument or case law in support of these claims. "When a party provides a brief without argument or citation of authority, we may 'treat the points as waived, or meritless, and pass them without further consideration.' " (*In re Marriage of Stanton* (2010) 190 Cal.App.4th 547, 561.) We will not review the claim.[7]

C. SIXTH CAUSE OF ACTION

It is not entirely clear what McEntyre is arguing as to the sixth cause of action. It appears she is claiming that under *Baral*, this court can only consider in support of the sixth cause of action the protected activity, which was her appearance at the California Labor Board Commission meeting.

[7] In her reply brief, McEntyre provides further argument on these claims. However, points raised for the first time in the reply brief will ordinarily not be considered especially in this circumstance in which she has failed to show why these arguments were not made in the opening brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.)

However, *Baral* provides "Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute." (*Baral*, *supra*, 1 Cal.5th at p. 394.) "Assertions that are 'merely incidental' or 'collateral' are not subject to section 425.16." (*Ibid*.)

Here, the stalking claim was based on several incidents. Kyle attested that McEntyre had waited outside his gym on two separate occasions. Further, Parker provided evidence that McEntyre had driven onto AIA property despite the restraining order forbidding her access to AIA property. The trial court properly considered that all of the comments made by McEntyre were important to provide context for the stalking. Even if we were to somehow conclude that her appearance at the California Labor Commission hearing was protected activity, it was merely incidental to the other nonprotected activity, which supported the stalking cause of action. (*Baral*, *supra*, 1 Cal.5th at p. 394.)

We note that defendants who prevail on their anti-SLAPP motions are entitled to recover their attorney fees and costs. (§ 425.16, subd. (c)(1).) Here, since the SLAPP Motion was unsuccessful, no fees were awarded. On appeal, we dismiss the cause of action for interference with actual and potential business advantage. "[A] party need not succeed in striking every challenged claim to be considered a prevailing party within the meaning of section 425.16." (*Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 339) However, "[A] party who partially prevails on an anti-SLAPP motion must generally be considered a prevailing party unless the results of the motion were so insignificant that the party did not achieve any practical benefit from bringing the

motion. The determination whether a party prevailed on an anti-SLAPP motion lies within the broad discretion of a trial court." (*Id.* at p. 340.) The trial court is in the best position to determine whether attorney fees should be awarded.

DISPOSITION

The trial court is directed to strike the fourth cause of action for interference with actual or potential business advantage. We otherwise affirm the trial court's order denying the SLAPP Motion. Each party is to bear their own costs on appeal

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

I concur:

RAMIREZ
P. J.

[*Hi-Land Mountain Homes, Inc. et al., v. Wendy McEntyre*, E069194]

MENETREZ, J., Concurring in part and Dissenting in part.

I agree that the denial of the anti-SLAPP motion as to the fourth cause of action should be reversed, but I disagree with the majority's reasoning. I also believe that the denial of the anti-SLAPP motion as to the second cause of action should be reversed.

The only arguments that McEntyre raises as to the first, third, fifth, and sixth causes of action are based on the litigation privilege and *Baral v. Schnitt* (2016) 1 Cal.5th 376. I agree with the majority that those arguments lack merit, and I agree with the majority's reasons. I join no other part of the majority's discussion because I believe the remainder of the majority's analysis is either unnecessary or incorrect. For example, McEntyre prevailed in the trial court on the issue of whether her Facebook posts and Yelp! reviews were in a public forum and in connection with an issue of public interest. No party challenges that determination on appeal, so we should express no opinion on it. I therefore do not join Part B.1 of the majority's discussion.

In addition, the majority's reason for rejecting the fourth cause of action is specious and was not raised by McEntyre. According to the majority, the fourth cause of action should be stricken on the ground that "it is not clear what unlawful act or conduct supports this cause of action," because the allegations concerning some of McEntyre's acts were stricken as untimely. (Maj. opn., *ante*, at p. 26.) But as the majority notes, the fourth cause of action was based on all of McEntyre's alleged statements and acts. (*Id.* at

p. 6.) Because some of those allegations were stricken, the fourth cause of action is now based on the remaining allegations. There is no lack of clarity, much less a fatal one.

As to both the second and the fourth causes of action, however, McEntyre argues that plaintiffs did not introduce sufficient evidence of damages to show a probability of success on the merits. McEntyre is correct. The only evidence of damages as to either cause of action consists of two sentences in the declarations of Kyle and Kory Avarell, which state "on information and belief" that (1) "Above it All has been negatively impacted by McEntyre's statements . . . because potential clients have chosen treatment at other facilities over Above it All," and (2) the Avarells' individual reputations have "been negatively impacted" by those statements as well. That evidence is not sufficient—no reasonable trier of fact could base a finding of damages on such slim and speculative evidence. Because plaintiffs failed to introduce evidence sufficient to sustain a judgment in their favor on the second and fourth causes of action, both causes of action should be stricken. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713-714; *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 108.)

For all of these reasons, I would reverse as to the second and fourth causes of action but otherwise affirm, and I would omit analysis of issues that are not properly before us. I therefore concur in part and dissent in part.

MENETREZ

J.